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No. 365.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

MISSOURI PACIFIC RAILROAD COMPANY,
PETITIONER,

VS.

SOPHIA DAVID, ADMINISTRATRIX OF THE ESTATE OF JAMES LEE DAVID, DECEASED,
RESPONDENT.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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STATEMENT.

The petition in this case, construed in the light of this court's rules and the nature of certiorari asserts in effect that the Supreme Court of Missouri has decided a case under the Federal Employers' Liability Act (U. S. C. Title 45, Sec. 51) in a way probably not in accord with applicable decisions of this court (Sub. (a) Sec. 5, Rule 38).

In its petition and the statement of its reasons for the allowance of the Writ (Pet. 23) Petitioner has limited the scope of its complaint here to the question as to the sufficiency of the evidence principally with respect to the application in this case of the doctrine of assumption of risk. Applying the rule announced in *Great Northern Railway Co.* v. *Knapp,* 240 U. S. 464, the case then is one which merely involves an appreciation of all the facts and admissible inferences for the purpose of determining whether there were matters for the consideration of the jury. The test upon this question is whether the error of the Missouri court is palpable.

In order to correct inaccuracies and omissions in Petitioner's statement the respondent deems it necessary to make a brief statement of the facts shown by the record.

(Page references are to the Transcript of the Record.)

James Lee David was employed, about April 1, 1923, by the Missouri Pacific as a train rider, at a salary of $135.00 a month and expenses. It was admitted that at the time of his death he was engaged in interstate commerce (11). He was the husband of the widow-administratrix, Sophia David, the plaintiff in this case. They had been married twenty-two years at the time he was killed, and were the parents of two children, aged eighteen and nineteen respectively. At the time of the trial she was still a widow and was operating a power machine for the Kansas City Garment Co. (171-173).

The Special Agent's Department.

In the company's organization the work of protecting property owned by and in the company's care, was in a special department, under a chief special agent, located at St. Louis. Directly under him were two assistant chief special agents, one located at Kansas City, Mo., and the other at Little Rock, Ark., between whom the company's territory was divided. Under the two assistants there were in all sixteen divisional special agents, each of whom had direct charge of the work on his division. Within each division there was a further detailed organization of lesser ranking personnel.

R. S. Mitchell of St. Louis was chief special agent. W. H. Boult of Kansas City was assistant chief special agent, assigned to the western lines (12-14). C. M. Barber was divisional special agent at Kansas City (192).

The Train Riders.

The train riders in the railway service were part of this department (23). They were under the jurisdiction of the divisional special agent, by whom they were assigned to the trains of the company, not on regular runs, but as and where needed (24). It was their duty to examine the seals on the car doors and see that they were intact, and that the train was all right, both before departure and en route (35). In a general way they were to protect the trains (23). For this purpose they were provided with flashlights (190).

There was no fixed rule about the number that would be assigned to a given train. That was a matter within the discretion of the local man. If men were available more than one rider would be sent with a train.

> *"If the local man thought it necessary for some reason he might send more than one"* (p. 24).

Nor was there any fixed rule about where they would ride on a train. That was left to the rider's judgment (35). On the occasion in question, for example, there were two train riders, the deceased and one Boyd. When Mr. David boarded the train he road in the caboose. At the first stop, he went on up through the train to the engine and there rode into Leavenworth, Kansas (188).

Mr. Boult, the assistant chief special agent at Kansas City, testified:

> "Q. Were any train riders instructed to go armed?
>
> "A. We never instructed them at all, they was to protect the train.
>
> "Q. You knew, did you not, as to whether or not they were going armed, or whether they were going unarmed?
>
> "A. Apparently did.
>
> "Q. Well, didn't you give them any instructions in that respect?
>
> "A. We never gave them any instructions not to go armed.
>
> "Q. Well, did you ever give them any instructions to go armed?
>
> "A. I don't know that I ever did.

"Q. When they went armed who provided them with guns, pistols or firearms?

"A. They had them themselves. We didn't, the Missouri Pacific didn't (36).

* * * * * * * *

"A. Instructions had been issued to all train riders on account of having so many robberies, to be on the lookout for robberies and be able to protect themselves, *by all means, not to get hurt, if they could prevent it*" (59).

Mr. L. Q. Moore, a night sergeant under the special agent at Kansas City (193), and the man who assigned Mr. David and Mr. Boyd to the fatal ride, described one of the serious complications in this case in this way:

"Q. Now, Mr. Moore, have you also served as train rider?

"A. Yes, sir; I have ridden a few trains—not very much.

"Q. As a matter of fact, there are frequently tramps found riding trains, aren't there?

"A. Yes, sir.

"Q. Men who are just bumming rides from different points to different points, aren't there?

"A. Yes; that is true.

"Q. And men who are not attempting to resort to robbery or crime of any kind—just trying to get a lift from one town to another? That is true, isn't it?

"A. *Well, you can't tell what a fellow is doing when he is riding a train*" (186).

The Bandit Gang.

For some time before Mr. David was employed, the company had been annoyed by an organized gang of thieves in and about Kansas City (16). Among

some dozen members of the gang, Bert Gladson, Lawrence Hayes, Nathan (Red) Loar and Hogy Ward were identified as participants (40). They were bad men, described by Mr. Boult as being:

> "The biggest bunch of thieves, and bank robbers and murderers (including) the man who had formerly shot our special agent, Fred Conklin, at Osawatomie" (56).

The divisional special agent, Mr. Barber, and Mr. Moore, the night sergeant, both said that this gang would shoot on sight (194, 183). Lawrence Hayes, one of the gang, testified that loaded guns were carried and that they were for use when occasion required; that the gang would shoot its way out of trouble, if trouble confronted it (163).

Naturally the gang diversified its activities and shifted its attack. "They don't rob any particular run, at different parts of the road" (Boult, 39). Robberies were mentioned at Leavenworth, Atchison, Stillwell, Osawatomie and Paola, in Kansas, and at Pleasant Hill and Raytown, Missouri (39-42). These affairs did not happen every night. "We were being robbed every week around Kansas City at this time" (26). At the time he was employed Mr. David was informed of this situation and told to be careful and watch out for himself (183, 194).

The Employment of McCarthy.

Mr. Mitchell, the chief special agent, became very much concerned about the company's losses from this source and resorted to the familiar and common

weapon of espionage (16-201). Through the Union Pacific's chief special agent, Mr. Mitchell and one Harry McCarthy were brought together in the Baltimore Hotel at Kansas City. Their meeting was characterized by Mr. Mitchell as a "hotel transaction." McCarthy was known as an all around "bad actor." He and Mr. Mitchell talked alone for three hours. McCarthy told him his history, "as I recollect it, his whole life had been a life of crime" (Mitchell 17-20).

Of McCarthy's employment, Mr. Mitchell testified:

> "I talked with McCarthy probably two or three hours, at which time he told me the history of the robberies committed by this gang; he told me at that time who was acting as head of the gang, who was furnishing the brains for these thieves, and he told me a great many details in connection with these robberies; he told me that he was trailing with the gang and he wanted to get away from them. *I arranged with him to keep us informed as to the activities of this gang, to give us advance information, if possible, when this gang planned to rob our trains,* and further arranged with him, in the event he could not get to us, couldn't give us advance information, to give us information then as to the fence where the stuff was taken, as well as to who was in the robbery, and all the details possible. Now, after I had satisfied myself that McCarthy knew what he was talking about, *and I believed he could do what he contracted to do,* I arranged with him to pay him one hundred and fifty dollars a month for that sort of service, and then I called in my assistant, Mr. W. H. Boult, and I introduced Boult to McCarthy, and arranged with McCarthy his way of reporting to Mr. Boult, and left the matter in Mr. Boult's hands." • • •

"Q. He knew how to get hold of Mr. Boult?
"A. *Yes, night and day service.*
"Q. And where he could reach Mr. Boult at any time if he might want him?
"A. Yes, sir.
"Q. Did you know who the thieves were with whom he was supposed to be associating?
"A. He told me all of their names at that time.
"Q. Who were they?
"A. I don't remember all of them; one was named Loar, one was Gadsden—

"By Mr. Hackney: I think it is Gladsten; Hayes.

"By the Witness: Yes, Hayes; Loar, Gladsten; I don't know; there was a dozen of them" (17-18).

"Q. The substance of your three hours' conversation amounts to this, then: That he was to continue to trail with these thieves, with whom he was acquainted, and was associating, to acquire any information he could possibly get about any anticipated robberies they were going to pull off, and to immediately inform you of those things?
"A. Yes" (32).

McCarthy's Instructions About Reporting.

Mr. Boult, the assistant chief special agent, was thoroughly conversant with this arrangement.

"Q. Now, when he was employed what instructions did you give him in respect to what he was to do?
"A. Well, we couldn't very well give him instructions, he was a man to furnish us with information where those robberies were committed, who was committing them and if he could get to us in time to tell us before the robbery was committed, if not, to tell us what had become of the goods.

"Q. Well, what was the plan and arrangement in respect to whether or not he was to go with this gang on their robberies, robbing expeditions?

"A. He was to continue the same as he did to get information, that is generally up to the man's own idea that is working.

"Q. Well, do you mean the plan was that he was to continue with this gang, Gladston, Loar, Hays and others?

"A. *His instructions were that he was to get us word before the robbery was committed, if he could, if not, to give us information as soon as he could after the robbery had been committed.*

"Q. Who was he to report this information to?

"A. Myself.

"Q. Did you advise him as to how to reach you *any time through the night or day?*

"A. *Through the telephone*" (41).

The Protection Provided.

The purpose of these reports was obvious. Mr. Mitchell testified:

"Q. You say he was to make his reports to Mr. Boult?

"A. Yes, sir.

"Q. Or to someone that Mr. Boult might designate?

"A. That is it; I left him in Mr. Boult's lap.

"Q. That was to enable you to fortify yourselves against the expected robbery?

"A. Yes, that was to enable us to catch these thieves.

"Q. You expected, whenever you got notice from McCarthy that anything like that was to take place, to detail additional men on the train at that time, or wherever the robbery was to occur?

"A. No, it was taken care of in various ways; that was one of the ways.
"Q. What were other ways?
"A. Take an automobile and go out and intercept them" (22).

Mr. Boult graphically described what took place on one occasion when McCarthy reported an impending robbery. About *five o'clock* one evening McCarthy reported in person to Mr. Boult, in Kansas City, Missouri, that the gang was going to rob a train at Kenneth Tank in Kansas (according to the map, this is about twenty-five miles out of Kansas City).

"We immediately went there with the men to cover that place. * * * We immediately got our men, got help from Paola and covered this point all night.
"Q. *Did you also notify the train riders on these respective trains to be on the lookout.*
"A. *Yes, sir.*
"Q. Did you put on any extra train riders?
"A. That night we didn't. We didn't have them.
"Q. But you warned them all?
"A. *We warned them all.*
"Q. And in addition to that you had police officers covering the place where the robbery was expected to take place?
"A. Not that night" (44-45).

Plans somehow miscarried and the robbers never left Kansas City, Kansas (46).

McCarthy, from the time of his employment until the time Mr. David was killed made other reports to Mr. Boult from time to time, not regularly, but apparently they were in touch with each other all of the time (43). Mr. Boult's best recollection was that Mc-

Carthy might have called him as late as the day before Mr. David was killed (48).

The Planning of the Fatal Robbery.

On May 16th, 1923, Hogy Ward, one of the gang, was being tried in the District Court of Wyandotte County, Kansas, for a payroll holdup. Certain of his confederates were in attendance as spectators. This group included Bert Gladsen, Lawrence Hayes, George Riley and others, and the stoolpigeon McCarthy (62-118).

Out in front of the court house during the noon hour they (including McCarthy) had a conversation about robbing box cars of the Missouri Pacific at Leavenworth that night. "We had intention of coming up and robbing box cars that night," and the plan was agreed upon (63-64).

> "Q. To rob any particular train?
> "A. Why, most generally they get the best merchandise there, about one-thirty in the morning" (76).

This was a train that carried cigarettes mostly and they were interested in cigaretes. It stopped at Leavenworth and it was at Leavenworth that they expected the robbery to take place (66-118). *They had robbed this particular train at the same place several times before* (128).

They discussed the expedition at different times, practically all afternoon. Lawrence Hayes testified that he first heard of it somewhere around two o'clock (118-119). They decided that right after the trial

adjourned they would meet down at Riley's house, when and where they would make their arrangements, "try to get two cars to come up, some of the boys didn't want to come up" (Gladsen 63).

After court had adjourned that evening they all went down to Riley's house on South Coy Street in Armourdale, in Kansas City, Kansas. There they consulted, and Gladsen, Hayes, McCarthy and one Charles Masterson agreed to go. This was about six-thirty in the evening (66-67).

Mrs. Ada Riley, mother of George Riley, testified to this meeting. It occurred, she said, along in the evening, near supper time. She understood that Missouri Pacific box cars were their objective and Leavenworth the chosen place (170-171).

The Events of the Evening.

They left Riley's house about six-thirty or a quarter of seven and went to a restaurant to eat (121). Then McCarthy, Hayes and Masterson drove to the Federal Reserve Life Insurance Building, at Seventh and Armstrong in Kansas City, Kansas (a block south of Minnesota Avenue, the principal business street), where Masterson wanted to see a doctor. They stopped in front of the building somewhere near eight o'clock. McCarthy and Masterson got out, Hayes waited in the car. Masterson went up to the doctor's office and McCarthy went *alone* to a drug store on the northeast corner of Seventh and Minnesota one block and a wide street north of Hayes and the car (122-123).

Masterson came back from the doctor's office in five or six minutes, got in the car, sat down, lit a cigarette and announced that the doctor was out and that he was going to wait. Hayes then proposed that they go down to the drug store and get something to drink. They turned around, drove to Minnesota Avenue, parked the car, locked it, went over to the drug store and joined McCarthy (122-123). Hayes estimated that from the time McCarthy left the car in front of the doctor's office until they rejoined him there, some seven or eight minutes elapsed. McCarthy was just looking around when they got there (124).

The three of them had a drink together and then Masterson went back to the doctor's office. McCarthy and Hayes drove to the foot of Minnesota Avenue (at Second Street) and watched a Missouri Pacific freight train go by (Hayes, 125). After that they drove back to Tenth and Minnesota, south on Tenth to Central Avenue, where they picked up Gladsen (125-126).

Wanting a fourth member of the party, they then drove to Nathan (Red) Loar's home, on South Fifth Street, in Armourdale. All the lights were out and McCarthy got out of the car, alone, went up on the porch and asked for Loar (68). Loar had been in bed and it took him ten or fifteen minutes to dress and come to the car (126).

They then drove to Ferry and Osage where McCarthy's sister lived, and McCarthy again got out of the car alone and went to the front porch to get

some overalls and a jumper. This house sat back on an alley. They stopped the car on the street. McCarthy's errand that time took him some 60 yards away from his confederates (126, 127).

Then they drove to Gladsen's home, at 833 South 13th Street, where they picked up two guns and an iron bar to open box car doors with (127).

They then drove straight to Leavenworth (68). They left Kansas City, Kansas, somewhere around ten o'clock and got to Leavenworth about eleven fifteen or twenty—a drive of a little over an hour. They stopped at an old sugar refinery on a little creek bridge about a half a block from the Missouri Pacific tracks, and waited for the train (128). "Oh, we must have waited about an hour or an hour and a half" (Gladsen, 69).

Mr. David's Train.

In the meantime, Train No. 173, a freight, was made up in the yards in the East Bottoms of Kansas City, Missouri. Its cargo was destined for points in Kansas and elsewhere (187, 38). It left Kansas City about ten o'clock (128).

On the night of May 16th, 1923, the train consisted of fifty-five or sixty cars. Mr. David probably boarded it at the A. C. Junction, (near the Missouri-Kansas line on the west side of Kansas City, Mo.). He rode the caboose from Kansas City, Missouri, to Wolcott, Kansas, the first stop. There he left the caboose and went up through the train to the head end, and rode on the engine into South Leavenworth.

The other train rider, Boyd, rode the caboose from Wolcott into Leavenworth. At South Leavenworth they took a siding to clear the track for a passenger train and stopped (188-189).

The Shooting of Mr. David.

When the train whistled at Leavenworth, McCarthy and Gladsen got out of the waiting bandit car and Hayes and Loar left. It was the plan that the former would break into the cars at South Leavenworth, get the stuff ready and throw it out at a particular crossing previously agreed upon in the north end of town, where the other two with the car would meet their confederates and return with the loot to Kansas City (129).

McCarthy and Gladsen went over to the railroad track, hopped the train and rode on down in the yards to the place where the train stopped. They were both armed and McCarthy had the pinch-bar, the breaking tool (69-70).

The train had been on the passing track probably ten minutes when the fatal shooting occurred. Mr. Dougherty, the train conductor, and Mr. Boyd, the other night rider, left the caboose and proceeded forward between the main line and the passing track. Boyd was behind Dougherty. When they reached a point twenty-five to thirty car lengths from the engine, he heard two shots "pretty close together," fired about four or five car lengths ahead of where they were. Boyd then commenced shooting. Dougherty went to Mr. David and found him lying on the ground dead.

He testified, "it appeared he was shot (in the chest somewhere) from someone standing up and ranged downward" (191). Mr. David fell between twenty and twenty-five cars lengths from the engine, where he had been when the train stopped, and on the same side of the train where Dougherty and Boyd were walking. Mr. Dougherty did not see Mr. David when he was shot, did not see the shooting and saw no gun-flashes. Mr. David had a revolver and sawed-off shot gun on him at that time (186-192).

The first information Mr. Boult had about the affair came to him after the killing. His night sergeant called him at his home in Kansas City, and he, the sergeant and two special agents drove to Leavenworth that night (50).

McCarthy's Reports.

The first report Boult had from McCarthy he received between seven and eight o'clock the next morning when one of his officers called Mr. Boult at Leavenworth on the telephone from Mr. Boult's office in Kansas City. McCarthy was at the office at the time and talked with Mr. Boult over the telephone. Later Boult talked with him in person. McCarthy gave him "all the information on who killed David, how it happened, and he went to Leavenworth with me to make the report to the county attorney" (Boult 52).

The defendant developed on the cross examination of Lawrence Hayes that McCarthy testified in the trial of Bert Gladsen for the murder of Mr. David, where he was convicted and given a life sen-

tence, and that McCarthy there testified that Gladsen was the man who shot David (140). Mr. Mitchell also testified:

> "Q. So after the killing of David, then McCarthy assisted in convicting these men that were responsible for Mr. David's death?
> "A. Testified against them, yes, sir.
> "Q. They were on trial over there in the Kansas court and Gladsen is the man shown to have shot David?
> "A. Was convicted of shooting David.
> "Q. And is serving a life sentence now?
> "A. And is serving a life sentence now.
> "Q. At Lansing, Kansas?
> "A. Yes, sir.
> By Mr. Hackney: That is all" (30).

McCarthy was continued in the service for some time. After he had testified, they got him a laborer's job in the roundhouse or shops, and "I (Mr. Mitchell) kept him employed for some time. * * * My instruction to Boult was to help McCarthy." Finally he left of his own accord (28-29). When the conviction for robbing Missouri Pacific box cars, which was pending in the Supreme Court of Kansas, on appeal at the time, was affirmed, he was paroled, Mr. Boult thought, by the judge from the bench. He thought McCarthy deserved some credit for helping to get rid of Gladsen and Loar, and was interested in his parole. He denied that he had spoken to the judge directly or signed an application. "I may have said I would like to see him paroled" (56).

McCarthy, however, did not testify at this trial.

To get back: McCarthy made no report to Mr. Boult or anyone else to Boult's knowledge about the fatal robbery (49) after it was planned at noon the day before it occurred (63-64), and the time Mr. David was shot down by Gladsen in the railroad yards at Leavenworth.

"Q. Had any warning or information been given David or Boyd of this particular intended robbery at Leavenworth, Kansas?

"A. The night David was killed?

"Q. The night David was killed.

"A. *I had no information that there was going to be one and there was no reason why we should give them one that night.*

"Q So, you didn't give—

"A. (interrupting) They had general instructions at all times.

"Q. I say, so you didn't give them any particular instructions that night?

"A. I didn't have any information" (Boult, 59).

SUMMARY OF BRIEF IN OPPOSITION.

I. Respondent is not raising any question about jurisdiction.

II. The Missouri Supreme Court held that decedent did not assume the risk of the extraordinary danger to which he was exposed, growing out of the petitioner's failure to fulfil its primary and non-delegable duty to warn him of an imminent and deadly danger known to it and unknown to him. Petitioner is relying upon the doctrine of common and ordinary risks equally known to employer and employee, and ignores the doctrine of extraordinary risk which was applied by the Missouri Court. Hence, the petitioner makes no showing under this point for the granting of writ in this case.

III. The Missouri Supreme Court held, consistently with plain doctrines of general acceptance in the National courts and elsewhere that the petitioner was in duty bound to warn the decedent of the imminent and deadly peril to which he was exposed which was unknown to him and known to it. Here again petitioner is relying upon decisions which are distinguishable and not in point because they do not concern situations involving the disparity of knowledge which existed here. Hence no reason is advanced under this point for allowing the writ.

IV. Petitioner's complaint that the Missouri Court's decision, that the decedent had a right to rely

upon the petitioner's secret agent whose employment and presence in the system was unknown to decedent, is contrary to this court's decision in *St. L. & S. F. Rd. Co.* v. *Mills, infra,* is without merit because in that case complaint was made of a deficiency in a gratuitous service, whereas here complaint is made of a specific failure to function of a method of work selected by the petitioner and liability is predicated upon a default in the performance of an elemental non-delegable duty to warn. Hence the *Mills* case constitutes no basis for certiorari here.

V. Petitioner's contention that the rule of *respondeat superior* does not apply because the informant McCarthy was an independent contractor has no force on its merits and has no place here because not raised at the trial or in the Supreme Court of Missouri except upon the petition for rehearing which was overruled without opinion.

VI. The petitioner's *alter ego,* the stool pigeon, knew of the time and place of the intended robbery at noon of the day before it occurred at one-thirty in the morning. He was instructed how to communicate with his superiors by phone day or night, and was not suspected by his confederates. Hence, the finding of the jury that McCarthy could have communicated with his superiors had ample support in the evidence.

VII. The contention that there was an absence of proof of proximate cause is groundless.

VIII. The jury was not left to conjecture, speculation or guess.

BRIEF IN OPPOSITION TO PETITION.

(Following Petitioner's Order of Argument.)

I.

Respondent Is Not Raising Any Question About Jurisdiction.

II.

The Supreme Court of Missouri Recognized and Applied the Law of Assumption of Risk in Strict Accordance With the Decisions and Declarations of This and Other Federal Courts.

The Supreme Court of Missouri quoted petitioner's contention in this connection as made before it (See Rec. 228-229) and answered it in this language:

> "Assumption of risk arises out of the contract of employment, the obligations of which are mutual. The servant on the one hand impliedly agrees to assume the risk of all dangers and perils ordinarily incident to the work undertaken by him; the master on the other hand impliedly contracts that he will at all times do whatever may be needful to minimize or obviate such risks, in so far as the same may be done by the exercise of ordinary care. It is axiomatic that, *prima facie*, a servant does not assume any risks which may be obviated by the exercise of reasonable care on the master's part (3 Labatt's Master and Servant) (2d. Ed. Sec. 894).
>
> 'One, and perhaps the most important, of those exceptions (to the doctrine of assumption of risk), arises from the obligation

> of the master, whether a natural person or a corporate body, not to expose the servant, when conducting the master's business, to perils or hazards against which he may be guarded by proper diligence upon the part of the master. To that end the master is bound to observe all the care which prudence and the exigencies of the situation require* * * (*Hough* v. *Railroad,* 100 U. S. 213, 217).
>
> 'It is those risks alone which can not be obviated by the adoption of reasonable measures of precaution by the master, that the servant assumes.' (*Pantzar* v. *Mining Co.,* 99 N. Y. 368, 376; see also Labatt, *supra,* Sec. 1178 and cases cited in the notes.)

"Although David knew, appreciated and assumed the dangers incident to his employment, it was, notwithstanding, the continuing duty of his employer to exercise ordinary care to minimize or obviate them. That a timely warning to David, giving him the information which appellant had acquired in advance of the intended robbery, subsequently attempted, would have greatly minimized, if not obviated, its perils to him, is so obvious as to require no elaboration. In its failure to give such warning, appellant was derelict in the discharge of a duty both moral and legal."

While the court below was content (and properly so) to rest its decision in this respect upon the language of *Mr. Justice* Harlan in *Hough* v. *Railway Co.,* 100 U. S. 213, 217, the decision and declaration of law it here makes is identical in substance with repeated declarations of this court, in cases under the Federal Employers Liability Act.

Chesapeake & Ohio Railway Co. v. *De Atley,* 241 U. S. 310, 36 Sup. Ct. Rep. 564.

Chicago & Northwestern Ry. Co. v. *Bower,* 241 U. S. 470, 36 Sup. Ct. Rep. 624.
Chesapeake & Ohio Ry. Co. v. *Proffitt,* 241 U. S. 462, 36 Sup. Ct. Rep. 620.
Gila Valley C. & N. R. Co. v. *Hall,* 232 U. S. 94, 34 Sup. Ct. Rep. 229.
Chicago R. I. & P. Ry. Co. v. *Ward,* 252 U. S. 18, 40 Sup. Ct. Rep. 275.
Reed v. *Director Gen'l of Rlds.,* 258 U. S. 92, 42 Sup. Ct. Rep. 191.

The measure of petitioner's elemental duty to warn its employee of extraordinary dangers known to it and unknown to him was aptly stated by Circuit Judge Gray in *Peters* v. *George,* (C. C. A. 3d C.) 154 Fed. 634.

> "The question is always, whether the negligence charged is the neglect of a primary and absolute duty of the master to the servant. If such be its character, no delegation of the performance of that duty to another, no matter how inferior his rank may be in the master's service, can, as we have already said, relieve the liability of the master for its neglect. The master does not insure the safety of the servant, but he does undertake that the place in which he works, and the appliances with which he works, and the conditions under which he works, shall be reasonably safeguarded. A dereliction of the humblest employe in the master's service, to whom any part of such duty has been delegated, is the dereliction of the master. Therefore, in the language of the opinion just referred to, it will be seen that the question turns rather on the character of the act than on the relation of the employes to each other. It has never been doubted that a master's duty to an ignorant or inexperienced workman, *indeed to any workman about to undertake more than*

ordinarily dangerous work, is to explain its dangerous character and give adequate caution as to its prosecution. This duty is of the absolute, personal character above referred to, and is not discharged by merely intrusting its performance to a properly selected subordinate. Nothing short of actual notice of the danger to the workman who is to encounter it, with such cautionary explanation as may enable him to avoid it, wil satisfy the requirement of the law, and the default of the intermediary, whether he be the highest officer in control, or merely a fellow workman of the one exposed to the danger, is the default of the master. • • •

"Reasonably efficient supervision of work of the dangerous kind here described, must be held to be one of the primary and personal duties of the master."

The case of *McCalman* v. *Illinois Central R. R. Co.*, (C. C. A. 6th Cir.) 215 Fed. 465, involved injuries received by a railway guard during a strike in a pistol battle with a party of United States marshals, when the latter were mistaken for strikers and fired upon by a group of guards of which McCalman was a member.

"It is a general rule as respects any hazardous occupation that the master shall inform his servants of all perils to which they will be exposed, *which are* or should reasonably be known to him, except such as are obvious to the servants or through the exercise of ordinary care on their part may be foreseen and in either event injury therefrom reasonably avoided" (citing cases).

"And the duty so imposed upon the master is of a primary character and is therefore non-delegable."

> "The chief danger rationally to be apprehended lurked in the telephone message, 'There was trouble at Nonconnah,' and the deputies approached the crossing with that belief. The nature of the danger, if under all the circumstances it was one reasonably to be anticipated, did not lessen defendants' duty to McCalman; for *knowledge of these new conditions would have enabled him to decide whether to remain at the crossing or discontinue his service.*"

In the case of *Co-operant Telephone Company* v. *St. Clair,* (C. C. A. 2nd C. 1909) 168 Fed. 645, a lineman was electrocuted when he came in contact with some live wires, which he did not, but his employer did, know were carrying current. The court said:

> "Well settled principles of law determine the conclusion. It is the duty of the master to use reasonable care in securing the employee a reasonably safe place to work, *and to be reasonably careful in warning the servant of any special and particular dangers incident to some particular locality about which the master is advised or should be advised, if he has been reasonably careful;* that precise definition of the word 'reasonable,' varying, of course, with the circumstances of each particular case."

Or as succinctly defined by the court in *Cincinnati N. O. & T. P. Ry. Co.* v. *Hall,* 243 Fed. 82:

> "The employer's duty requires information to his employee of all perils which should be reasonably known to the employer, *and of any change which introduces a new element of danger.*"

(And see text and cases cited in *Hall* case *id.* 80 and 81 and notes.)

Petitioner's exception to the declaration of the Missouri Court that there was a continuing duty of the master to minimize or obviate the danger to which David was known to be exposed, is therefore not well taken. Knowing that the danger (which petitioner's argument expressly concedes was deadly) was imminent, the petitioner was in duty bound to minimize or obviate it by giving David timely warning, and David, in the absence of such warning, was entitled to assume that he knew as much about his situation as did the petitioners, and to act accordingly.

The case of *Toledo St. L. & W. R. Co.* v. *Allen*, 276 U. S. 165, 48 Sup. Ct. Rep. 215, cited and quoted from by the petitioner states this distinction clearly in this language:

> "The reason for the distinction is that plaintiff's knowledge of the situation and the dangers existing because of the narrow space between the tracks was at least equal to that chargeable against the defendant. * * *
>
> "And there is no support for the assumption that plaintiff was without knowledge of the switching practice followed in that yard or that the movement in question created an unusual hazard. On the evidence it must be held that he knew how switching was done there; and, in the absence of proof that he was exposed to some unusual danger by reason of a departure from the practice generally followed, it cannot be held that defendant was in duty bound to give him warning."

In this case the decedent's knowledge of the situation and the imminent and present dangers existing because of the presence upon the train of armed and

desperate men was not equal to that *actually possessed* by the defendant. There is no contention that the decedent had any knowledge of this imminent peril or that the immediate presence of these desperados created an unusual hazard different from the common and ordinary risk of the employment. Instead of there being an absence of proof that he was exposed to some unusual danger by reason of a change in the situation, it is conceded that he was at that time exposed to that very danger which resulted in his death. Therefore, under the converse of the doctrine announced in the *Allen* case, it must be held that defendant was in duty bound to give him warning and that David cannot be held to have assumed the risk known to the petitioner about which he was not warned.

An examination of the cases cited by petitioner under Section II of its brief in support of its petition (Br. p. 26) shows that they all do no more than announce and apply the rule stated by the Missouri Court in the opinion in this case that the servant agrees to assume the risk of all dangers and perils ordinarily incident to the work undertaken by him. Each one of those cases stresses the fact that there was an absolute parity of knowledge of the risks and dangers between the employee and employer. Not one of them deals with a situation such as existed here where there was a clear disparity of knowledge between them—where an extraordinary danger was known to the employer and unknown to the employee, a situation controlled by the *DeAtley* case and its companion cases cited above.

Therefore, rather than there being any cause to believe that the Supreme Court of Missouri has committed palpable error by deciding the case at bar not in accordance with the applicable decisions of this court, the decision of the Supreme Court of Missouri is strictly in accordance with the decisions of this court. In this decision, the Supreme Court of Missouri fully recognized and applied the common law doctrine of assumption of risk as declared by this and other Federal Courts, in cases arising under the Federal Employers Liability Act and otherwise.

III.

David Was Entitled to Special Warning of the Impending Attack of the Desperados Upon His Train.

Petitioner argues that the inherent nature of Mr. David's work was sufficient warning to him of the danger which caused his death. The Supreme Court of Missouri answered this argument in the following language:

> "Appellant argues that as David had been warned specifically and fully with regard to the activities of the gang of thieves, of their dangerous character and of the likelihood of their attempting to shoot and kill him in case he came in contact with them, it can not be reasonably inferred that he would have been any more alert or would have taken any greater precaution for his own safety, on the occasion of the attempted robbery at Leavenworth, had he been forewarned with respect to it. The argument overlooks the fact that the dangers generally incident to David's work, like those of any policeman who walks a beat at night,

were merely contingent and in a sense remote. Foreknowledge that a specific danger will arise at a definite time and place will bring about quite a different reaction on the part of a policeman or any other. In addition to quickening the perception of the danger, such knowledge makes possible the adoption of adequate measures to meet or avoid it. From the characteristics of the thieves and their methods of operating, it is quite clear that they never courted an open battle with train guards; they merely shot their way out of trouble. If David had known of their presence when he left the engine cab, he would also have known that it was not only possible, but highly probable, that some of them were lurking between the box cars. With that knowledge it is inconceivable that he would have exposed himself to the particular peril which cost him his life. To say that he might have been killed anyway, even if he had been forewarned that the thieves would be there and had consequently followed a different course for the purpose of warding them off and protecting the company's property, is to leave the evidence for an excursion into the field of conjecture. From the evidence it may be justly inferred that David's death resulted from appellant's failure to warn" (Rec. 233-234).

The duty to warn under these circumstances is amply sustained in the cases heretofore cited:

Peters v. *George*, (C. C. A. 3rd Circuit) 154 Fed. 634.

McCalman v. *Illinois Central Rd. Co.*, (C. C. A. 6th Cir.) 215 Fed. 645.

Cooperative Telephone Co. v. *St. Clair*, (C. C. A. 2d Cir.) 168 Fed. 645.

Cincinnati N. O. & T. P. Ry. v. *Hall*, 243 Fed. 76.

See also—

Baxter v. *Roberts,* 44 Cal. 187.
Holzhouser v. *Denver Elec. Co.,* 18 Col. App. 431, 72 Pac. 289.
Perry v. *Marsh,* 25 Ala. 659.

None of the cases cited by petitioner under Section III of its brief (Pet. & Br. p. 31) is in point. The case of *St. Louis & San Francisco Ry. Co.* v. *Mills,* 271 U. S. 344, 46 Sup. Ct. Rep. 520 is distinguishable upon the ground that there was no disparity of knowledge between the decedent and the company. Indeed, in that case there was no knowledge whatever except of the general danger. A loyal car inspector during a strike was being accompanied home by a special agent. Without warning they were attacked by strikers and had no opportunity to defend themselves. This case certainly does not hold or was ever intended to be construed as holding that if the company had known of the time and place of the attack, and had failed to warn its employe of his hazard, no liability would have attached to it for that failure. *Atlantic Coast Line* v. *Southwell,* 275 U. S. 64, 48 Sup. Ct. 25, is similarly irrelevant here. It involved a wilful murder in a personal altercation, which it was asserted the general yard master, who was present, might have prevented had he foreseen the fatal consequences. This Mr. Justice Holmes said was unreasonable to expect of him under the circumstances. In that case the yard master was in the position of an innocent bystander. In this case the servant whose default is complained of, was that servant who was expressly commissioned to ob-

serve, and duty bound to report, the very fact which lead ultimately to Mr. David's death.

Feaster v. *Southern Ry. Co.*, 15 Fed. (2d) 540, was a case involving the death of a deputy sheriff hired as a guard over railroad property during the strike of 1922. From all that appears from the opinion, he was murdered by persons unknown before and after the fact. The court emphasized the fact that in those circumstances no care that the railroad company could have taken would have prevented the death. In the case at bar, Mr. David's murderers were known to the defendant before and after his death. Gladson, who killed him, was sentenced to life (the maximum of Kansas), on the testimony of McCarthy, who knew, during the noon hour of the day before the death, when and where the violence would occur. The Supreme Court of Missouri has very correctly said that had David had the benefit of the knowledge that McCarthy had had for those twelve hours, "it is inconceivable that he would have exposed himself to the particular peril which cost him his life."

The cases of *Lowry* v. *Atlantic Joint Terminals*, 145 Ga. 782, 89 S. E. 832, and *Manwell* v. *Durst Bros.*, 178 Cal. 752, 174 Pac. 881, are seen, upon examination, to be in the same category of irrelevancy.

There is no merit, therefore, in petitioner's contention that David was not entitled to special warning and certainly no showing made that the decision of the Supreme Court of Missouri in this particular is not in accord with any decision of this court.

IV.

It Was Immaterial That David Had No Knowledge of the Employment of McCarthy As An Informant.

Petitioner bottoms its argument in Section IV of its brief upon *St. Louis & San Francisco Rd. Co.* v. *Mills,* 271 U. S. 344, 46 Sup. Ct. Rep. 520. The difference between the two cases in this respect is marked. The Railway Company delegated one deputy sheriff to accompany the decedent in that case to his home during a strike. The opinion states that it was not contended that the company owed the employe any duty to guard him against violence by strikers. "Respondent here asserts that the defendant, having assumed to do something, should have done more," and that the claim of liability arose out of a deficiency in a gratuitous service.

Petitioner's contention in this respect is fully answered by the language of this Court in *Chesapeake & O. R. Co.* v. *Proffitt, supra,* that "the employe has a right to assume that the employer has exercised proper care with respect to providing a reasonably safe place of work (and this includes care in establishing a reasonably safe system or method of work)," and by the language of Circuit Judge Gray in *Peters* v. *George, supra,* that, "it has never been doubted that a master's duty * * * to any workman about to undertake more than ordinarily dangerous work is to explain its dangerous character and give adequate caution as to his protection." It is axiomatic that:

"'It is one of the legal duties of the master to give his servant warning of any extraneous and *unusual* danger to which he may be subjected; and if the master fails to use ordinary care to do so, and the servant is injured, the master is liable *because the injury did not flow from any risk assumed by the servant, but from the personal negligence of the master.* Nor can the master avoid liability by making it the duty of an agent to give such warning, and then, if it is not given, say that the negligence was that of a fellow servant. In such cases the maxim *qui facit per alium facit per se* applies as between the master and the servant entitled to the warning; and the servant or agent appointed to give the warning, no matter what his grade or rank in the general service of the master, becomes, or such purpose, the *alter ego* of the master. His act is the master's act; his failure the master's failure.'" (7 Am. & Eng. Enc. of Law (2d Ed.) 417, and cases cited.)

The resort by the Company to the age-old method of espionage by the employment of stool-pigeons in combating the harassing depredations of the Gladsen gang was no more than the establishment of a system or method of doing its work. By adopting it, petitioner itself selected its own standard of care. The employment of McCarthy, therefore, was not a voluntary act as was the delegation of the special agent to guard the employe in the *Mills* case. Nor would the warning that would have been given Mr. David, had McCarthy, with ample time and opportunity to do so, obeyed the command of his superiors and reported this information he had acquired in the discharge of his duty been a gratuitous service. McCarthy was the *alter ego* of the Company in the discharge of its non-delegable personal

duty to warn David of dangers known to it and not known to him arising in and about the place of his employment. The only distinction between McCarthy and any other special agent of the Company was the fact that McCarthy was under cover. Had any one of the special agents of the defendant been possessed of the same information that McCarthy had for twelve hours before the fatal attack, and had failed to carry out express orders to report it, we are confident that petitioner would not have the temerity to contend that the Company would not be responsible for his omission, whether David was specifically apprised of his employment or not.

Qui facit per alium facit per se. McCarthy's knowledge was the knowledge of the Missouri Pacific Railroad Co. His failure to report and hence to warn David was the failure of the Missouri Pacific Railroad Co. Mr. David's ignorance of McCarthy and his employment could not in any way alter that situation.

There is, therefore nothing in common between the *Mills* case and the case at bar, and again we submit that petitioner has failed to impeach the decision of the Supreme Court by the test laid down in *Great Northern Railway Co.* v. *Knapp, supra.*

V.

Petitioner Cannot Now Contend That McCarthy Was An Independent Contractor and Not An Employee On Whose Account the Doctrine of Respondeat Superior Applies.

(1) There is no merit in the contention that the Supreme Court of Missouri committed a palpable error

by holding that McCarthy was the agent of the petitioner and no decisions of this court are cited as being those with which it is claimed the decision of the Missouri court is in any way probably not in accord.

The statement at the beginning of this brief fully describes McCarthy's employment, its terms and his activities under it. If the contention on its merits had any place here it seems to us sufficient to say that if McCarthy was not an employee for whose acts in the line of his duty the petitioner was responsible, the Missouri Pacific Railroad Company has no such employees.

(2) But the contention has no place here. The question was not presented at the trial in the form of a request for instructions to the jury, or in any other way.

On the contrary defendant requested instructions which were given based on the theory that McCarthy was an employee (Deft's Inst. 4, Rec. 206). The question was not in fact raised before the Supreme Court of Missouri in any form until petitioner filed its petition for rehearing which was "denied and nothing more" (Rec. 234). Hence, under the familiar rule of this court this question is not open now.

Willoughby v. *Chicago*, 235 U. S. 45, 35 Sup. Ct. Rep. 23.

Wall v. *Chesapeake & O. Ry. Co.*, 256 U. S. 125, 41 Sup. Ct. Rep. 402.

VI.

Under the Evidence McCarthy Had Ample Opportunity to Communicate With the Petitioner.

The Supreme Court of Missouri adequately answers petitioner's argument in this connection in the following language:

> "Appellant contends that McCarthy had no opportunity for communicating with Boult over the telephone prior to the happening of the event without uncovering himself as an informer. The evidence, however, abundantly justifies a finding to the contrary. It shows that for reasons of his own McCarthy absented himself from the members of the gang for a brief interval two or three times during the evening prior to the departure for Leavenworth. It further shows that there were many other occasions during the same period when, on one pretext or another, he could have left them for a sufficient length of time to have gotten into communication with Boult's office—unless he was under suspicion, and that is not remotely suggested by the record" (Rec. 227).

At best, this was a question of fact for the jury which was submitted in plaintiff's Instruction 1 and defendant's Instruction F (Rec. 205-208).

From the statement made at the beginning of this brief, the court will observe that the record shows that this informant, who knew how to get in touch with the petitioner at all hours of the day and night, had sufficient information of the impending robbery from noon of the day before it occurred at one-thirty in the morning to have adequately fulfilled the requirements of the duty prescribed for him in his original contract of employment.

VII.

As to Failure of Proof of Proximate Cause.

The petitioner does not advance any discussion on this point, and we believe it has been adequately covered in the opinion of the Supreme Court of Missouri, and what has been said heretofore.

VIII.

The Jury Was Not Left to Conjecture, Speculation or Guess Work Because of Lack of Evidence.

We likewise believe that the points made in this section of the brief were adequately covered by the Supreme Court of Missouri (Rec. 231).

Conclusion.

It is respectfully submitted that the judgment below was not for the wrong but for the right party; that there is no reason to believe that in this decision the Supreme Court of Missouri has in any way departed from the rules of law long recognized and applied by this court, but, on the contrary, its decision here is entirely consistent and in accord with those rules of law.

There is no reason therefore why the petition for the writ of certiorari from this court to the Supreme Court of the State of Missouri should be allowed.

Respectfully submitted,

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